It remains to be considered what order this Court should make. Although I have held that the respondent should not have been charged under section 113 (i) (a), it is possible that he committed an offence under some other part of the sub-section. If that were so it would be a case for amendment; the Magistrate might have allowed an amendment or have ordered a discharge not amounting to an acquittal. I think that the most convenient thing is to amend the finding into one of discharge not amounting to an acquittal. This will enable the prosecution if it is advisable to bring a charge under the appropriate part of the sub-section.

Finding amended to discharge not amounting to acquittal.

[APPELLATE CRIMINAL JURISDICTION]

HORNE, J.

June 14, 1940.

P. A. ANSELAM vs. PUBLIC PROSECUTOR.

[NEGRI SEMBILAN MAGISTRATE'S CRIMINAL APPEAL No. 16 of 1940]

Criminal Procedure Code (Cap. 6), sections 107 and 329—Evidence Enactment (Cap. 10), sections 25 and 35—Witness—Previous unsworn statement—Effect thereof—Report to Police—Admission amounting to confession—Admissibility.

With the leave of the Magistrate the prosecution treated a witness as hostile and cross-examined him upon a previous unsworn statement.

Held, such cross-examination is not for the purpose of substituting the unsworn statement for the testimony given in open Court on affirmation. All that it can do is to prevent the Court giving any value to the sworn statement.

In order to connect the accused with drugs and syringes found in a certain house, the prosecution put in a report made by the accused. This report was information under section 329 of the Criminal Procedure Code, and did not necessarily call for an entry in the book kept under section 107 of the Code: but the entry was in fact made.

Held, that such an entry is an entry in an official book made by a public servant in the discharge of his official duty. If it states a fact in issue or a relevant fact it is itself a relevant fact under section 35 of the Evidence Enactment (Cap. 10). Where the statement in such report is an admission by an accused person, the person to whom such admission is made ought to be called in order that the defence should have an opportunity to cross-examine him. In the present case it was an admission of a fact which would tend to prove the guilt of the accused, and amounted to a confession. Having been made to a police officer below the rank of Inspector it is excluded by section 25 of the Evidence Enactment.

Cases referred to:—

(1) *Rex v. Harris* (1927) Cr. App. R. 144.

(2) *Barindra Kumar Ghose v. Rex,* I.L.R. 37 Cal. 467.

(3) *Rex v. Raji Sher Mohamed,* I.L.R. 46 Bom. 961.

(4) *Behari Lal v. Rex,* I.L.R. 8 Lahore 326.

CRIMINAL APPEAL.

S. C. Goho for appellant.

A. J. Grattan-Bellew, Deputy Public Prosecutor, for respondent.

Horne, J.—The appellant was convicted by the learned Magistrate at Tampin for having been in possession of two syringes and a deleterious drug contrary to section 17 (i) of Chapter 183 and was fined $300 or 6 months' imprisonment. He appeals against his conviction on the grounds that the Magistrate was wrong in law in holding there was evidence of possession in relying upon the evidence of Haji Abdul Halim; and was wrong in law and fact in calling upon the appellant for his defence; and in convicting him because the evidence as a whole should have raised a reasonable doubt in his mind.

Mr. Goho strongly attacked Haji Abdul Halim's evidence. The Magistrate has accepted the evidence of this witness to the effect that the rents of the house were sometimes paid by the accused. With the leave of the Magistrate the prosecution treated this witness as hostile and cross-examined him upon a previous unsworn statement after the witness had admitted he had made the statement. There is, however, nothing in the notes of evidence to indicate the nature of the statement. By inference it is contrary to what he had already sworn, viz., that only the woman paid the rent of the house. Then after this unrecorded cross-examination the notes read: "The witness now states that the rent was sometimes paid by the accused, sometimes by Muthu." There is no record of any attempt being made to ascertain why the witness gave such varying statements on an important matter. Such cross-examination is not for the purpose of substituting the unsworn statement for his testimony given in open Court on affirmation. All that such a cross-examination can do is to prevent the Court giving any value to his sworn statement that the woman always paid the rent. The Magistrate was clearly wrong in placing any reliance upon this witness. He should have been treated as negligible and the verdict found on the rest of the evidence, *Rex v. Harris*(1).

During the hearing I questioned the admissibility of the Exhibit P2 as part of the case for the prosecution. This document is the report made by the appellant at the Police Station at about 5.45 p.m. on the 11th November, 1939, about a Chinese whom he had observed to fall down and whom he had then assisted to hospital where he had died. According to this report the appellant had described the event as having happened outside his house. The information which the appellant gave the police was information under section 329 of the Criminal Procedure Code and does not necessarily call for entry in the book kept under section 107 unless of course it also relates to the commission of an offence. It was in this case entered in the book, and *Mr. Grattan-Bellew* submits it was admissible under section 35 (Evidence Enactment, Cap. 10). The point was not argued fully, but I am of the opinion that an entry in a book kept under section 107 of the Criminal Procedure Code is an entry in an official book made by a public servant in the discharge of his official duty. If therefore the entry states a fact in issue or a relevant fact it is itself a relevant fact. Under section 108A a certified copy of the entry may be admitted in a criminal proceeding as evidence of the contents of the original. Such a provision saves bringing the book to the Court. But where the statement in such report is an admission made by a person who is on trial for a crime, and the prosecution desire to prove such admission against him, they ought to call the person to whom such admission is alleged to have been made in order that the defence should have an opportunity to cross-examine him. Such a case very rarely arises for although there are distinctions between admissions and confessions, it will often be found that an admission by an accused on which the prosecution rely amounts to a confession. Is it so in this case?

The prosecution want the report because of the statement with which it opens, viz., "I was seated in front of my house", which is an important admission when it is sought to prove that the appellant had possession of the syringes and the ampoule of morphine at this house. The prosecution were attempting to prove this possession by shewing (a) a direct connection between the appellant and the box P4 and its contents P12-15; and (b) a direct connection between the appellant and the house, viz., that the tenancy was nominal, that the appellant paid the rent, and that the tenant was his kept mistress and regarded as his second wife. Moreover, the prosecution relied upon this admission of proprietorship or occupancy, for not content with putting it in evidence they asked the Magistrate to put questions to the appellant after he had entered upon his defence and had made a statement from the dock. When a Magistrate exercises his discretion under section 256 of the Criminal Procedure Code I think he should record the questions put. That was not done in this case. There can be no doubt that the Magistrate has largely based his conclusion of guilt upon his finding of fact that Muthu was the appellant's mistress. He should not, however, have admitted P2 in evidence for it is an admission of a fact which in this case would tend to prove his guilt. It therefore amounts to a confession and having been made to the police was excluded by section 25 of the Evidence Enactment. *Barindra Kumar Ghose v. Rex*[2]; *Rex v. Raji Sher Mohamed*[3]; *Behari Lal v. Rex*[4].

(The remainder of the judgment deals with the facts, resulting in a finding that there was sufficient evidence to support the conviction).

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

MURRAY-AYNSLEY, J.

June 10, 1940.

PUBLIC PROSECUTOR

VS.

CHIA LIP BOON & ORS.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 62 of 1940]

Excise Enactment (Cap. 133), section 13 (i)—Still, utensil or other apparatus—What constitutes.

The accused, having been found with certain articles which were component parts of a still but which were not capable by themselves of forming a complete still, were charged under section 13 (i) of the Excise Enactment and acquitted.

Held, a part of a still is a utensil and if the purpose for which the part was owned can be proved an offence under the section can be established.

Case referred to:—

(1) *Public Prosecutor v. Manickam* (1940) M.L.J. 133.

CRIMINAL APPEAL.

T. V. A. Brodie, Deputy Public Prosecutor, for appellant.

Respondents in person.